1979

Florence Gillmor v. Edward Leslie Gillmore : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORENCE GILLMOR,

Plaintiff-Respondent,

vs.

EDWARD LESLIE GILLMOR,

Defendant-Appellant.

Case No. 16271

BRIEF OF APPELLANT

Appeal from the Judgment of the [illegible]
in and for Salt Lake [illegible]
Honorable Peter [illegible]

[illegible]
[illegible]
[illegible]
Salt [illegible]

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FILED

[illegible]

Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORENCE GILLMOR, Plaintiff-Respondent, vs. EDWARD LESLIE GILLMOR, Defendant-Appellant.	Case No. 16221

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Peter F. Leary, Judge

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TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

FLORENCE GILLMOR, Plaintiff-Respondent,	)	
vs.	)	Case No. 16221
EDWARD LESLIE GILLMOR, Defendant-Appellant.	)	

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is a suit for a declaratory judgment seeking a determination regarding three written leases, (a) as to the termination date and (b) as to whether they are subject to renewal.

DISPOSITION IN LOWER COURT

The court made and entered a summary judgment dated July 25, 1978, declaring that two leases covering land in Tooele County and Summit County terminated on December 31, 1978, without right of renewal, which judgment was appealed to this Court, No. 16023, and on November 24, 1978, the Court made and entered an "Order and Judgment", after trial, declaring the two leases mentioned above and a third lease covering land in Salt Lake County shall terminate on December 31, 1978, with no right of renewal.

"20-426 - Florence J. Gillmor
The Southwest ¼ of the Southwest ¼ of Section 32, Township 2 North, Range 1 West, SLM, cont. 40 acres.

"20-359 - Edward L. Gillmor
The Southeast ¼ of the Northwest ¼ of Section 18, Township 1 North, Range 2 West, SLM, cont. 40 acres."

It will be further noted that at the bottom of pag
are the signatures of Edward L. Gillmor and Florence J. Gill
followed by the word, "Lessors".

Each lease contains the following provision relati
to renewal, the meaning of which is in controversy in this c

"THE LESSEES have the option to extend this l
for a period of two years upon the expiration of t
lease, provided the ownership of this property is
vested in the present Lessor."

The record in this case discloses that the interes
the lessee, Stephen T. Gillmor, was assigned to the defendan
(R. 179). Also, that Edward L. Gillmor was the owner of an
divided one-half interest in all of the land described in th
Lake County lease (R. 263). The defendant succeeded to his
in all of the land described in the lease by his will (R. 1
264, 265).

At the opening of the trial of this case, on Nove
1978, counsel for the plaintiff stated that the trial concer
only the lease on the Salt Lake County property. The plaint
put in evidence the lease on the Salt Lake County property,
(R. 258), and also the Summit and Tooele County leases (R.
after they were identified. Florence testified that she own

only the 40-acre tract described on page 6 of the lease and her father owned the rest and that she succeeded to her father's interest (R. 263). She also testified that her father died in 1970.

The defendant testified that in addition to the leases from his uncle, Edward L. Gillmor, he had written leases in the same form from his brother, Charles F. Gillmor, Jr., covering his one-fourth interest in the same land in all three counties. See Exhibits 4-D, 5-D, and 6-D. The defendant also testified that he owned a one-fourth interest in the land described in all of the leases (R.276).

An effort was made by the defendant to show the surrounding circumstances at the time of the execution of the leases. Objection was made by the plaintiff on the ground that the language in the lease regarding the right to renew is clear and unambiguous (R. 275). The objection was sustained (R. 278, 289).

The trial court made findings of fact that the renewal language in the each of the three leases that the words "present Lessor" referred only to Edward Lincoln Gillmor and that the plaintiff, Florence Gillmor, is not a "present Lessor"; that Edward Lincoln Gillmor died in 1970 and that the court "....independantly concurs...." in the summary judgment dated July 5, 1978 (R. 177-181). The court then entered a judgment, dated November 24, 1978, declaring that all three leases "shall terminate on December 31, 1978, and that the defendant has no right to renew any of the leases. (R. 182, 183)

This appeal is taken from the judgment dated Novem 24, 1978.

ARGUMENT

As stated above, this case and Case No. 16023 have consolidated for the purposes of Appeal and the brief in No. was filed on November 16, 1978. In that brief, the following points were argued which are pertinent to this case:

"II A covenant to renew a lease runs with t land

"III There are genuine issues of material fa

"IV The complications of cotenancy should b been considered by the Court

"V Options to renew a lease are construed strongly against the Lessor"

The arguments under the points indicated are adopte incorporated in this brief. The additional points directed t errors of the trial court in the trial of the case and in con ing the Salt Lake County lease are discussed below.

I

THE COURT ERRED IN EXCLUDING EVIDENCE OF SURROUNDING CIRCUMSTANCES.

The plaintiff's counsel throughout the trial took t position that the Salt Lake County lease was clear and unambi ous. We quote:

"Q. Do you remember whether the 1957 lease wa a lease and an option to purchase or simply a lease

"MR. LEE: Your Honor, I'm going to object to this line of questioning. He has answered he made a diligent search. He hasn't been able to find it. I don't think anybody among the parties has been able to find it. But I do not know how that relates to the '69 lease which we claim is clear and unambiguous. I believe any evidence relating to the--what the intention of the parties was with respect to that language is not admissible in evidence as long as it's clear and unambiguous."

See also arguments of counsel to the same effect, pp. 256, 275, 277, 278.

As indicated above, the Salt Lake County lease, Exhibit 1-P, was signed by two persons, Edward L. Gillmor and the plaintiff above the word "Lessors". On page 1 of the lease, Edward L. Gillmor is referred to as "Lessor" in the singular. The question in this case is whether in view of the fact that the plaintiff was actually named as one of the "Lessors" and the further fact that the one-half interest of her father, Edward L. Gillmor, had passed to her as the sole heir in 1970 and was owned by her at the time of the filing of this suit, made her a "Lessor" within the meaning of the renewal clause.

It will be noted that the proviso in the renewal clause states, "....provided the ownership of this property is vested in the present Lessor....". It does not say at what date the ownership is to be vested in the Lessor, nor does it say whether the word "Lessor" means both Lessors, Edward L. Gillmor and Florence J. Gillmor, or means only Edward L. Gillmor, who, according to plaintiff's counsel, was 92 or 93 years old in 1969 when the lease was made. (R. 296) See also deposition of Edward L. Gillmor, p. 26.

This is certainly an ambiguity within the meaning o the rule as to whether the plaintiff was a "Lessor", which pe mits the introduction of evidence as to surrounding circumsta

The rule regarding the admission of evidence to sho the surrounding circumstances is well stated in Continental B and Trust Co., v. Stewart, 4 Utah 2d 228, 291 p. 2d 890 as fo

> "In view of the lack of definiteness in the terms of the contract, it was proper for the court receive extraneous evidence as to its meaning. It true that the express terms of an agreement may not be abrogated, nullified or modified by parol testi but where, because of vagueness or uncertainty in t language used, the intent of the parties is in ques the court may consider the situation of the parties facts and circumstances surrounding the making of t contract, the purpose of its execution, and the re- spective claims thereunder, to ascertain what the parties intended."

It must have been within the contemplation of the p that a renewal clause would be meaningless and surplusage if would become effective only if the Lessor lived to be 102 or years old.

Another ambiguity is pointed out in the plaintiff's Memorandum in Support of Motion for Summary Judgment. (R. 7 at p. 77) under the heading,

> "Defendant is Not Entitled to Extend the Subj Leases for the Independent Reason that the Covenant Extend did Not Run with the Land, but was Personal Edward Lincoln Gillmor".

Was the intention of the parties to have the lease tinue for another two years to preserve the family livestock business by making the renewal provision a covenant running w the land? We think this is an ambiguity.

Another ambiguity is whether upon reading the provision relating to the sale of the property on pages 6 and 7 of the lease with the option to renew provision, it was the intention of the parties that the limitation of the renewal provision would take effect only if the land is sold.

The defendant was denied the right to go into surrounding circumstances when the court sustained a preliminary question was to the livestock business upon the often repeated argument by counsel for the plaintiff that the meaning of the lease was "clear and unambiguous" and that no evidence of surrounding circumstances was admissible. (R. 277)

In his opening statement to the court, counsel for the plaintiff said:

> "There will not be any evidence as to the intentions of the parties because we think it is clear and unambiguous".

We think the record is clear that the trial court adopted the theory of the plaintiff, held as a matter of law that there was no ambiguity and based its judgment thereon. The defendant was denied the right to show surrounding circumstances. This was error.

II

THE CASE WAS PREMATURELY FILED BECAUSE THERE WAS NO EXISTING CONTROVERSY AND ONGOING ACTIVITIES OF THE PARTIES MIGHT HAVE CHANGED THE FACTUAL SITUATION

Certain restrictions on the declaratory judgment proceedings which are applicable here were well summarized in the case

of Norvell v. Sangre de Cristo Development Co., USCA 10th Ci

519 F. 2d 370. We quote from page 378:

> "...This court has consistently held, however, that the test for determining an actual controversy via declaratory judgment proceedings is whether there is a controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of declaratory judgment. United States v. Fisher-Otis Company, Inc., 496 F. 1146 (10th Circ. 1974); Duggins v. Hunt, 323 F.2d (10th Cir. 1963).
>
> "We cannot render advisory opinions on unknown facts. Christian Echoes National Ministry, Inc., v. United States, 404 F.2d 1066 (10th Cir. 1968); Oklahoma City, Oklahoma v. Dulick, supra.
>
> "Finally, we hold that declaratory judgments a improper when, as here, ongoing activity may radica change the factual situation. In Mechling Barge Li v. United States, 368 U.S. 324, 82 S.Ct. 337, 7 L.E 317 (1961), the Supreme Court, in holding that decl tory judgment is a remedy committed to judicial dis tion, held, inter alia:
>
> > 'We think that sound discretion withholds the remedy where it appears that a challenged "continuing practice" is, at the moment adjudi tion is sought, undergoing significant modific tion so that its ultimate form cannot be con- fidently predicted.'
> >
> > 368 U.S. 324 at 331, 82 S.Ct. 337 at 341.'"

In this case, if, under the proviso in the renewal the time when ownership was to be vested in the lessor was De 31, 1978, (the end of the ten year lease) there could be an a controversy develop in only one of two ways, (1) the termina of the lease or (2) the filing of a document with the lessor cising the option and rejection by the lessor. The record sh nothing which would create an actual controversy.

With respect to the ongoing activities which might have changed the factual situation at the end of the term, there is attached to the complaint voluminous records in the pending partition suit between the parties. This was an ongoing activity which might well have changed the applicable facts as to the renewal of the lease.

CONCLUSION

The court erred in holding as a matter of law that the plaintiff was not a lessor on the Salt Lake County lease.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing Brief of Appellant was mailed, postage prepaid, to James B. Lee and Kathleen W. Lowe, of and for Parsons, Behle & Latimer, 79 South State Street, Salt Lake City, Utah 84111, attorneys for Plaintiff-Respondent, this 16th day of March, 1979.

Secretary